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In The

Supreme Court of the United States

Kentucky Retirement Systems,
Commonwealth of Kentucky, and
Jefferson County Sheriff's Department,
Petitioners,

v.

Equal Employment Opportunity Commission,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONERS

E. Joshua Rosenkranz
Kenneth H. Kirschner
HELLER EHRMAN LLP
Times Square Tower
7 Times Square
New York, NY 10036
(212) 832-8300
josh.rosenkranz@hellerehrman.com
Counsel for Petitioners

Robert D. Klausner
Counsel of Record
KLAUSNER & KAUFMAN, P.A.
10059 N.W. 1st Court
Plantation, FL 33324
(954) 916-1202
bob@robertdklausner.com
Counsel for Petitioners

Gregory D. Stumbo
David Brent Irvin
OFFICE OF THE
ATTORNEY GENERAL
700 Capitol Avenue
Suite 118, Capitol Building
Frankfort, KY 40601-3449
(502) 696-5300
attorney.general@ag.ky.gov
Counsel for Commw. of Kentucky

C. Joseph Beavin
James D. Allen
STOLL KEENON OGDEN PLLC
300 W. Vine Street, Suite 2100
Lexington, KY 40507-1801
(859) 231-3000
joseph.beavin@skofirm.com
Counsel for Petitioners

Additional counsel listed on inside cover.

N. Scott Lilly
Second Assistant County Attorney
JEFFERSON COUNTY
ATTORNEY'S OFFICE
531 Court Place
Suite 900, Fiscal Court Building
Louisville, KY 40202
(502) 574-6333
scott.lilly@louisvilleky.gov
Counsel for Jefferson County

William P. Hanes
Executive Director
J. Eric Wampler
General Counsel
KENTUCKY RETIREMENT
SYSTEMS
Perimeter Park West
1260 Louisville Road
Frankfort, KY 40601
(502) 696-8644
eric.wampler@kyret.com
Counsel for Kentucky
Retirement Systems

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

ARGUMENT 1

I. THE EEOC FAILED TO ESTABLISH A PRIMA FACIE CASE BECAUSE KENTUCKY'S RETIREMENT STATUTE DOES NOT DIFFERENTIATE AMONG EMPLOYEES "BECAUSE OF [THEIR] AGE." 1

A. The EEOC Advocates a Legal Standard that Is Inconsistent with the ADEA's Plain Language. 1

B. Kentucky's Statute Differentiates on the Basis of Eligibility for Normal Retirement, and Does Not Invoke Eligibility as a Pretext for Age Discrimination. 5

C. The EEOC Is Incorrect in Assuming that Normal Retirement Benefits Are Inferior to Disability Retirement Benefits. 11

II. THE EEOC HAS NOT ESTABLISHED A PRIMA FACIE CASE BECAUSE KENTUCKY'S RETIREMENT STATUTE DOES NOT "DISCRIMINATE," IN THAT ITS REFERENCE TO AGE IS NOT ARBITRARY. 15

III. LEGISLATIVE HISTORY AND POLICY RAMIFICATIONS SUPPORT KENTUCKY'S VIEW THAT AGE-BASED CRITERIA ARE NOT PER SE ILLEGAL IN RETIREMENT PLANS. 17

IV. THE EEOC'S INTERPRETATION IS NOT ENTITLED TO DEFERENCE. 22

CONCLUSION 24

TABLE OF AUTHORITIES

Page(s)

Cases

Bowen v. Georgetown Univ. Hosp.,
488 U.S. 204 (1988) 24

Christensen v. Harris County,
529 U.S. 576 (2000) 24

EEOC v. Arabian Am. Oil Co.,
499 U.S. 244 (1991) 24

In re GWI PCS 1, Inc.,
230 F.3d 788 (5th Cir. 2000) 24

Gen. Dynamics Land Sys., Inc. v. Cline,
540 U.S. 581 (2004) 3, 15

Hazen Paper Co. v. Biggins,
507 U.S. 604 (1993) 1, 2, 3

Teamsters v. United States,
431 U.S. 324 (1977) 10

Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Johnson Controls, Inc.,
499 U.S. 187 (1991) 3

Mass. Bd. of Ret. v. Murgia,
427 U.S. 307 (1976) 6

Pub. Employees Ret. Sys. v. Betts,
492 U.S. 158 (1989) 17

Trans World Airlines, Inc. v. Thurston,
469 U.S. 111 (1985) 3, 4

Watson v. Ft. Worth Bank & Trust,
487 U.S. 977 (1988) 10

United Air Lines, Inc. v. McMann,
434 U.S. 192 (1977) 17

Statutes and Regulations

26 U.S.C. § 61 13

26 U.S.C. § 106 13

29 U.S.C. § 623(a)(1) 1

29 U.S.C. § 623(f)(2)(B)(i) 16, 22

29 U.S.C. § 623(j) 6

Ky. Rev. Stat. § 16.576(3) 12

Ky. Rev. Stat. § 16.582 ..... 12, 13

Ky. Rev. Stat. § 16.645(25) 12

Ky. Rev. Stat. § 61.510(22) 13

Ky. Rev Stat. § 61.555 ..... 13, 14

Ky. Rev. Stat. § 61.607 12

Ky. Rev. Stat. § 61.615 12

Ky. Rev. Stat. § 61.702 ..... 12, 14

Ky. Rev. Stat. § 78.545(6) 14

29 C.F.R. § 1625.10 (1989) 22, 23

29 C.F.R. § 1625.32(b) (2007) 6

72 Fed. Reg. 72,938 (Dec. 26, 2007) 5, 6

Other Sources

136 Cong. Rec. 27,058 (1990) 19

2 EEOC Compliance Manual No. 915.003 (Oct. 3, 2000) 24

H.R. Rep. No. 101-664 (1990) 19

Rhonda M. Reaves, *One of These Things Is Not Like the Other: Analogizing Age sm to Racism in Employment Discrimination Cases*, 38 U. Rich. L. Rev. 839 (2004) 16

Report of the Secretary of Labor, *The Older American Worker: Age Discrimination in Employment* (1965) 15

S. Rep. No. 101-263 (1990) 19

ARGUMENT[1]

I. THE EEOC FAILED TO ESTABLISH A PRIMA FACIE CASE BECAUSE KENTUCKY'S RETIREMENT STATUTE DOES NOT DIFFERENTIATE AMONG EMPLOYEES "BECAUSE OF [THEIR] AGE."

A. The EEOC Advocates a Legal Standard that Is Inconsistent with the ADEA's Plain Language.

The EEOC concedes that it cannot establish a prima facie case of age discrimination unless it demonstrates that Kentucky intentionally differentiates among employees "'because of [their] age.'" Resp. 16 (quoting 29 U.S.C. § 623(a)(1)). The EEOC does not dispute that this statutory language means "there is no disparate treatment under the ADEA when *the factor motivating* the employer is some feature other than the employee's age." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993) (emphasis added).

The EEOC does not, however, even try to prove that age—as opposed to retirement eligibility—was the "factor motivating" Kentucky. It argues that the intent to discriminate "because of ... age" is

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[1] Petitioners' opening brief will be cited as "Pet'r" and the EEOC's response brief will be cited as "Resp." The amicus briefs will be cited as "____ Br.", according to the initials of the first-named amicus, except that the amicus brief submitted by 13 states will be cited as "States Br." This reply brief follows the same abbreviations and conventions as the opening brief.

evident on the face of Kentucky's statute, for one reason: that age *can be* a factor in determining eligibility for retirement (or in calculating the time remaining before retirement), which, in turn, determines eligibility for (or can influence the amount of) disability retirement benefits.

The only way the EEOC can make this argument, however, is to rewrite the ADEA's operative language. According to the EEOC, the phrase "because of ... age" means that "the ADEA generally requires" an employer to "'*ignore an employee's age*,' ... when a disabled worker applies for retirement benefits." Resp. 16 (quoting dicta from *Hazen Paper*, 507 U.S. at 612) (emphasis added). Thus, at critical junctures, the EEOC argues that Kentucky's retirement statute violates the ADEA merely because it entails "*consideration of* the applicant's age," Resp. 20 (emphasis added), or because it employs "explicit age-based criteria," Resp. 18.

Almost as soon as the EEOC redlines the statutory language, it retreats from its revised formulation. That is because, as the EEOC acknowledges, the ADEA does *not* "generally require[]" any such thing. Resp. 17; *see* Resp. 25. So the EEOC reformulates its reformulation into a one-way ratchet: "[T]he ADEA does not prohibit *all* uses of age as a criterion for awarding retirement benefits," the EEOC acknowledges. Resp. 26 (emphasis in original). Rather, it prohibits an employer only from "us[ing] the same age-55 threshold as a basis for paying older disabled employees *lower* benefits than similarly situated younger disabled workers would receive." Resp. 27 (emphasis in original).

None of this appears in the ADEA's actual language, which focuses on whether an employer has acted "because of ... age." The ADEA requires an analysis of whether the "motivating factor"—the *actual reason*—for denying benefits was retirement eligibility (as Kentucky insists) or age, *Hazen Paper*, 507 U.S. at 609, not whether the employer "ignores" age.

In support of its counter-textual reading, the EEOC invokes Title VII decisions holding "that *sex*-based distinctions in employment are facially discriminatory." Resp. 22 (emphasis added) (citing *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Johnson Controls, Inc.*, 499 U.S. 187, 200 (1991)). The EEOC posits that the same must always be true of "*age*-based distinctions," because "interpretation of Title VII" often "'applies with equal force in the context of age discrimination.'" *Id.* (quoting *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985)).

As this Court has since held, Title VII principles cannot be uncritically transplanted into the ADEA when they do not make sense. *See Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 586-87 (2004); Pet'r 46-48. This is one such circumstance. It would obviously be impermissible to tell an employee, "Sorry, you are not white enough (or male enough or American enough) to retire." It is, therefore, self-evident that an employer cannot invoke such an obviously impermissible eligibility rule to deny disability retirement benefits—or calculate their amount. Age is different, precisely because it *is* permissible

to tell an employee, "Sorry, you are not *old* enough to retire."

Thus, while there are times when an explicit age-based criterion obviously evinces a discriminatory intent, *see, e.g.*, *Thurston*, 469 U.S. at 121-22, there are other times when it does not. It can be permissible to calculate disability retirement benefits with reference to eligibility for normal retirement, so long as the reference to eligibility is not a pretext for age discrimination.

As is implicit in this last point, ruling in Kentucky's favor in this case would not mean that eligibility for retirement can "routinely" be used to "circumvent[]" the ADEA's "general ban on age-based discrimination." Resp. 26. The EEOC is correct, for example, that Kentucky "could not mandate ... that workers who are eligible for normal retirement benefits ... will be paid lower wages than employees who do not qualify for normal retirement." *Id.* The ploy would be impermissible because, in the hypothetical posited, retirement eligibility is obviously a pretext for age discrimination. There is no reason to diminish salary in light of eligibility for retirement *except* to discriminate on the basis of age. The same is true with respect to virtually all "other employment-related decisions," *id.*, such as whether to promote employees, whether to furnish health benefits to employees, or whether to offer severance in the event of a mass layoff. Because each of these employment decisions bears no rational connection to retirement eligibility, an artificial linkage would be a self-evident pretext.

The opposite is true in this context, precisely because the rationale for offering disability

retirement benefits is inextricably linked to retirement eligibility, and there is no evidence, and no reason to believe, that the linkage is pretextual—a topic we turn to next.

B. Kentucky's Statute Differentiates on the Basis of Eligibility for Normal Retirement, and Does Not Invoke Eligibility as a Pretext for Age Discrimination.

Because the EEOC focuses on the wrong legal standard, it fails to dispute any of the key principles or facts Kentucky has adduced to demonstrate that it is not differentiating among employees "because of [their] age," but is genuinely distinguishing among them on the basis of eligibility for normal retirement. The EEOC does not dispute that Kentucky's intent is to provide disability retirement benefits as a safety net only to those employees who are not already eligible for normal retirement benefits, *see* Pet'r 6-8, or that it is perfectly rational to define eligibility for the safety net with reference to when the safety net is needed, *see* Pet'r 22. There is no dispute that this is how the federal government has structured the Social Security disability program and how private insurers structure term disability insurance. Pet'r 49-50.

In fact, just two days ago, the EEOC promulgated a final regulation applying this very structure and rationale to retiree health benefits. *See* 72 Fed. Reg. 72,938 (Dec. 26, 2007). The EEOC has declared that an employer may "alter[], reduce[] or eliminate[]" retiree health benefits "when the participant is eligible for Medicare

health benefits." *Id.* at 72,945 (adding new 29 C.F.R. § 1625.32(b)).

The EEOC has not pointed to anything in the record suggesting that Kentucky's asserted motivation is an artifice masking an actual intention to disfavor older workers. There is nothing that belies the District Court's observation that, "[t]he fact that a combination of service years and age will often be used to compute retirement eligibility is an actuarial reality and not a mask used to hide discrimination." J.A. 32.

Indeed, the EEOC has never so much as suggested a theory as to why Kentucky would want to invoke retirement eligibility as a ploy to discriminate against older employees, especially in the context of a plan that (as the EEOC acknowledges) otherwise "gives relatively favorable treatment to ... older hazardous duty workers ... who choose to retire voluntarily." Resp. 30 (emphasis omitted). Any such notion would be especially incongruous here, because Kentucky was free to adopt a much more direct way to disfavor older hazardous duty employees, if that is what it intended: The ADEA authorizes states to push all police officers and firefighters into retirement on their 55th birthday. *See* 29 U.S.C. § 623(j); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 314 (1976) (upholding a mandatory retirement policy for police officers).

In trying to prove discriminatory intent, the EEOC focuses mainly on how "benefits are computed." Resp. 28. Specifically, the EEOC finds discriminatory intent in how Kentucky "us[es] imputation ... to increase the amount of benefits paid to disabled persons ... , by crediting them for

years that they might have worked if they had remained healthy." *Id.* (emphasis omitted).

The EEOC is mistaken. Any instance in which an older employee might receive lower benefits is not "because of [the employee's] age," but because of the employee's proximity to a legal eligibility milestone. Both the evident purpose of the statutory scheme and its structure confirm this conclusion. And the EEOC's repeated references to the statute's impact do nothing to prove an impermissible intent. We address each point in turn.

Purpose. The EEOC puts its finger on Kentucky's goal when it acknowledges that it would be "understandable" for Kentucky to act on an "impulse to ensure that all disabled employees have an adequate minimum level of benefits." Resp. 30 n.13. As the EEOC understands, Kentucky has made the judgment that employees who are further away from a retirement milestone deserve, and often need, a boost to reach a sustainable benefit level. Kentucky achieved this goal with an approach that reflects the reasonable expectations of the employees it wanted to attract. Based on the premise that employees of any age look to retirement eligibility as a critical juncture in their professional lives, Kentucky chose to impute to disabled employees the number of years they would have needed to reach that eligibility milestone (subject always to a cap based upon the number of years already served). J.A. 21-22.

That, of course, means that Kentucky does not award imputed years of service beyond age 55. In arguing that this is illegal, the EEOC misses a fundamental point about the overall structure of

the retirement statute. Younger workers must toil for 20 years in order to be eligible to collect retirement benefits. Kentucky recognized that most older employees will never make it that long, especially in a hazardous duty job. Confronted with this reality, Kentucky faced three choices: (1) fire its hazardous duty employees when they reach age 55, which Kentucky has full power to do, *see supra* at 6; (2) allow them to continue working past 55, but deny them any retirement benefits until they hit their 20th anniversary (treating them just like younger employees); or (3) allow them to work past 55 *and* treat them better than younger co-workers by allowing them to take normal retirement after serving as little as five years.

To the extraordinary benefit of older workers, Kentucky chose option 3. *See* NASRA Br. at 14. The EEOC's position is that when it comes to disability retirement, Kentucky must ignore the reality on which this benefit is premised—that most older workers will not serve 20 years—and assume the opposite. According to the EEOC, Kentucky cannot provide the accommodation of accelerated retirement without also compounding the benefit based on the premise that every older employee *would* have worked the full 20 years "had he remained healthy." Resp. 16; *see* Resp. 30 n.13. That approach would have been prohibitively expensive, it would have borne no relationship to the employees' expectations, and it would have given new meaning to the bromide about "good deeds." Nothing in the ADEA requires such a counterintuitive result. *See* NAC Br. at 19-20.

The EEOC responds by accusing Kentucky of using "favorable treatment of one class of older

workers" to "justify discrimination *against* a different class of workers." Resp. 31 (emphasis in original). Kentucky is doing no such thing. The group of employees that Kentucky is accused of discriminating against—older employees who will reach 55 before celebrating their 20th anniversary on the job—is the same as the group of employees that Kentucky went out of its way to benefit. Upon taking a job, and throughout his employment, no employee knows whether he will fall into the class of employees who will make it to normal retirement eligibility or the class that will become disabled before then. Older employees who take the job accept the highly advantageous upside of a more imminent retirement eligibility milestone—along with the security of disability benefits if they cannot make it to the milestone—but they take these benefits subject to the eminently fair correlative limitations on that particular route to retirement in the event of disability. *See generally* NAC Br. at 19.

Structure. The structural features of the statute enumerated in Kentucky's opening brief confirm that this imputation of service is not a manufactured ploy to differentiate among employees "because of ... age," but a legitimate distinction based on eligibility for retirement. *See* Pet'r 23-24. First, all the rules governing calculation of benefits apply in the same way to an employee who is closer to the 20-year milestone as to an employee who is closer to the age-based milestone. Pet'r 23. Second, for many employees—all those who are closer to the 20-year service milestone—age simply has no bearing on the amount of disability retirement benefits. *Id.* The same is true of any employee over 55 who has at

least 20 years of service; this case will have no effect on any employee who has over 20 years of service. Third, an older disabled employee could (and often does) fare better than a younger one with regard to the amount of disability benefits generally, and specifically with regard to the number of years imputed. *See* Pet'r 11 (example 3), 23-24; J.A. 94. All of these attributes bespeak an intention to focus on eligibility, not age *qua* age.

Impact. Without any evidence of *intent* to discriminate, the EEOC repeatedly tries to fill the void with evidence of the Kentucky statute's *impact*. The EEOC variously refers to "[t]he effect of the KRS plan," Resp. 12; to what a worker in certain "circumstances ... *may* receive," Resp. 25 (emphasis added); and to the supposedly "broad range of circumstances" in which a younger employee "will receive a higher benefit" than an older one who is similarly situated, Resp. 27 n.11; *see also* Resp. 6, 16-17, 18. All of this adds up to a concession that "the essence of [EEOC's] disparate-treatment claim in this case is that older disabled employees *will often* receive significantly lower retirement benefits than KRS would have awarded to a younger disabled worker with the same length of service." Resp. 20 (emphasis changed).

This is a contradiction in terms. The EEOC cannot prove its "disparate-treatment claim" with reference to the statute's "effect" or to what "will often" happen. *See Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977); *Watson v. Ft. Worth Bank & Trust*, 487 U.S. 977, 1002 (1988). If the EEOC thought it could prove disparate impact, it would have brought a disparate-impact case. Having declined even to allege disparate impact,

the EEOC cannot now prove intent by dousing its brief with an "essence" of impact.

C. The EEOC Is Incorrect in Assuming that Normal Retirement Benefits Are Inferior to Disability Retirement Benefits.

Completely apart from the invalidity of the legal test the EEOC applies, the EEOC's position fails for another reason: The EEOC cannot satisfy its own test, which is premised on demonstrating that Kentucky's age-based distinction is "a basis for paying older disabled employees *lower* benefits than similarly situated younger disabled workers." Resp. 27 (emphasis in original). In an effort to satisfy this test, the EEOC asserts at every turn that imputed service is a "*distinctly advantageous* feature of disability retirement," Resp. 18 (emphasis added), and that disability retirement benefits are "more generous" than normal retirement benefits, Resp. 28; *see* Resp. 15 (asserting "adverse treatment" for older employees).

The premise that pervades the EEOC's argument is false. Disability retirement benefits in Kentucky are not necessarily *superior* to normal retirement benefits; they are *different*. The simple reality is that no employer ever wants to design a plan that entices employees to claim a disability rather than working to (or taking) normal retirement.

To be sure, disability retirement includes some benefits—such as imputed years and certain other advantages under limited circumstances—that are unavailable to those taking normal retirement. But

there are many respects in which normal retirement is better.

First, a person who takes normal retirement retains the option of taking another job, whether in public service or in the private sector, without any reduction in benefits. KRS §§ 16.576(3), 16.582. An employee who takes disability, in contrast, can never return to a similar job—anywhere—if he wishes to hold onto disability retirement benefits. *See id.* §§ 16.582(1)(a), 16.645(25), 61.615.

Second, disability retirement benefits are subject to a cap of 20 years of service (actual or imputed), compared to normal retirement, in which the multiplier for service years is unlimited.

Third, disability retirement benefits, unlike normal retirement benefits, are subject to various offsets. In Kentucky, as in many other states, the disability payments are reduced by the amount of Social Security disability and workers compensation. *Id.* § 61.607. Consequently, even when a disability benefit appears to be higher than a normal retirement benefit, the net amount will often nevertheless be lower.

Fourth, Kentucky covers certain health insurance premiums in a way that is especially valuable to employees who take normal retirement. *Id.* § 61.702(3)(a). The percentage of the premium that Kentucky will cover is based on years of service. *Id.* For example, an employee with 20 years of service gets his insurance premiums covered in full. *Id.* But the imputed service that is awarded to a disabled retiree does not count toward the thresholds. *See id.* § 61.702(3). This means that, all else being equal, the employee on

normal retirement enjoys a valuable advantage over his disabled colleague. The differential is magnified because (1) health insurance premiums always increase over time; and (2) the subsidy is tax exempt, *see* 26 U.S.C. § 106, unlike retirement benefits, *see id.* § 61.

Fifth, an employee who takes normal retirement can avail himself of certain enhancements that are unavailable, or less favorable, to an employee who takes disability retirement. Foremost among them is the option to "purchase" additional years of service: Under certain circumstances—most notably when an employee has served in the military or in specified other government jobs—the employee can pay a bargain price to add more years onto his actual service and have those years treated as if the employee had actually worked them. KRS § 61.555; *see also id.* § 61.510(22). Purchased service, then, boosts the employee's retirement benefit and could push the employee across a threshold for free health benefits.

The Kentucky statute imposes no cap on the number of additional years of service that can be purchased by an otherwise qualified employee who takes normal retirement (although federal tax law might cap the benefit). *Id.* § 61.555. Not so for an employee on disability retirement, who is limited to a maximum of 20 years of service credit, whether actual service, imputed service, or purchased service. *Id.*; *see also id.* § 16.582.

Because of some of these advantages of normal retirement, Mr. Lickteig, the complainant who started this case, fares *better* under normal retirement than he would have fared had Kentucky

allowed him to collect the disability benefits he demanded. That is because Mr. Lickteig increased his benefits in two ways that would have been prohibited had he been allowed to take disability retirement: (1) he purchased nearly two more years of military service credit, J.A. 19 n.2 (citing KRS §§ 61.555, 78.545(6)); and (2) he worked an additional 11 months after his application for disability was denied, J.A. 18. Through these two steps, Mr. Licktieg enhanced his actual service of just under 18 years, thereby increasing his benefits over what he would have gotten had his request for disability retirement been granted.

More importantly, these two steps also pushed Mr. Lickteig across the 20-year threshold for free health insurance, J.A. 19, entitling him to have Kentucky pay his full health insurance premium in perpetuity. KRS § 61.702(3)(a). Had he been awarded disability retirement, he would not have crossed the threshold—because imputed years would not count toward health benefits—and he would be paying 25% of the ever-rising health insurance premiums for the rest of his life. *Id.* Thus, in an ironic twist, if the EEOC prevails, Mr. Lickteig will owe Kentucky a refund.

So which is better—normal retirement or disability retirement? The question cannot be answered in the abstract. Nor can it be answered from the face of the plan. It certainly cannot be answered by isolating one component of the package and ignoring the rest, as the EEOC tries to do. The answer always depends upon the idiosyncratic circumstances, needs, interests, values, and intentions of a particular employee.

This point underscores just how unworkable the EEOC's proposed rule is. A rule that age-based eligibility criteria are permissible when they are "more generous" to older workers, but facially illegal when they are not, Resp. 28, will inevitably devolve into the unanswerable question, "Which is better?"

II. THE EEOC HAS NOT ESTABLISHED A PRIMA FACIE CASE BECAUSE KENTUCKY'S RETIREMENT STATUTE DOES NOT "DISCRIMINATE," IN THAT ITS REFERENCE TO AGE IS NOT ARBITRARY.

The EEOC acknowledges that Congress did not intend to eliminate all age-based distinctions, but only "arbitrary" ones. Resp. 32; *see Gen. Dynamics*, 540 U.S. at 587; Pet'r 44. It also confirms that the concept derived from the Wirtz Report, which found a need to target a different "kind of discrimination" with regard to older workers. Resp. 33 n.14 (quoting Report of the Secretary of Labor, *The Older American Worker: Age Discrimination in Employment* 2 (1965) ("Wirtz Report")).

Nevertheless, the EEOC asserts that when Congress and this Court have emphasized this limitation, they have not thereby "requir[ed] a court to decide in each case whether a particular form of age-based disparate treatment reflects denigrating stereotypes." Resp. 32. According to the EEOC, what Congress meant was that any age-based distinction is necessarily "arbitrary," within the meaning of the ADEA, "unless the discrimination falls within one of the ADEA's specified statutory exceptions, such as the

exception for benefit plans that are justified by differences in cost." Resp. 34 (citing 29 U.S.C. § 623(f)(2)(B)(i)).

For at least two reasons this assertion is inconsistent with the history and language of the ADEA. First, the original version of the ADEA had the same (or very similar) defenses as Title VII, yet only in the ADEA did Congress emphasize that the prohibition was limited to "arbitrary" distinctions. *See* Rhonda M. Reaves, *One of These Things Is Not Like the Other: Analogizing Ageism to Racism in Employment Discrimination Cases*, 38 U. Rich. L. Rev. 839, 880-82 (2004) (comparing differences in defenses available under Title VII and the ADEA). That must mean that the defenses, alone, do not define the limitation.

Second, the cost-justification defense cannot be what breathes meaning into Congress's 1967 reference to "arbitrary age discrimination." That ADEA-specific defense was added by the OWBPA in 1990.

In short, the only way to give effect to Congress's pronouncement that it was targeting only "arbitrary age discrimination" is to conclude that not every age-based distinction is prima facie illegal, but only those age-based distinctions that are arbitrary.

For reasons described in Kentucky's opening brief, Kentucky's retirement statute is not arbitrary. Pet'r 48-50.

III. LEGISLATIVE HISTORY AND POLICY RAMIFICATIONS SUPPORT KENTUCKY'S VIEW THAT AGE-BASED CRITERIA ARE NOT PER SE ILLEGAL IN RETIREMENT PLANS.

In support of its reading of the ADEA, the EEOC relies heavily on the origins and legislative history of the OWBPA and on certain policy ramifications. Both support Kentucky's view.

Legislative history. Everyone agrees that this Court's holding in *Public Employees Retirement System v. Betts*, 492 U.S. 158 (1989), was the major impetus behind the enactment of the OWBPA. *See* Pet'r 39-41. We all agree also that *Betts* effectively exempted virtually all benefits plans from age-discrimination claims.[2] That was what had Congress up in arms.

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[2] The EEOC quibbles with Kentucky's explanation of *how Betts* achieved this result. Resp. 39 n.17, 44 n.21. It is true, as the EEOC asserts, that one of the holdings in *Betts* was to constrict the phrase "compensation, terms, conditions, or privileges of employment," so as to remove fringe benefits plans from the ADEA's purview. Resp. 38-40. But, contrary to the EEOC's assertion, *Betts* also issued the equally controversial holding that "an employee benefit plan adopted prior to enactment of the ADEA cannot be a subterfuge," rejecting the argument that Congress, in 1978, had overruled a case articulating exactly that rationale. *Betts*, 492 U.S. at 168 (embracing rationale of *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 203 (1977)); *see* Pet'r 40-41. Congress definitively overruled *both* holdings in the OWBPA. Either way, the bottom line is that Congress was concerned with rulings that purported to immunize virtually all benefits plans from the ADEA, not with the outcome for one specific plan.

The parties disagree over two points. The first is whether this Court intended to convey any view in *Betts* as to whether the specific plan at issue would have been adjudged illegal had it fallen within the ADEA's scope. The EEOC contends that that was "[t]he clear thrust of the Court's analysis," Resp. 42, while Kentucky has argued that this Court never reached the question, *see* Pet'r 40. On this point, the best evidence is the *Betts* opinion itself, which says nothing at all about whether the plan was illegal.

The second bone of contention is a related dispute over whether Congress in the OWBPA intended to declare the specific plan in *Betts* illegal, or whether it intended simply to ensure that that plan and others would not be categorically exempt from the ADEA's strictures. On this point, the best evidence is the statute Congress actually enacted, which the EEOC accurately describes in a single page. *See* Resp. 41. As is evident from the EEOC's own account, none of the broad-brush legislative fixes purported to do anything but subject all benefits plans to ADEA review. The actual legislation certainly does not prescribe any rules for assessing various forms of age-based criteria, much less any specific retirement plan.

All of which explains why the EEOC puts so much stock in quotes snatched from the legislative history. But these, too, furnish the EEOC no support. For the most part, these snippets confirm what the parties already agree upon: that Congress "'intend[ed] to make unmistakably clear that the ADEA's purpose'" was to "'eliminate[e] age discrimination in all forms of employee benefits,'" and that Congress intended to "'overturn[] both the

reasoning and the holding of the Court in *Betts*'"—about the categorical immunity of fringe benefits plans from the ADEA. Resp. 43 (quoting S. Rep. No. 101-263, at 17 (1990); H.R. Rep. No. 101-664, at 33 (1990)).

The rest of the quotes—two of them—are directed at proving a proposition that, as a general matter, Kentucky does not dispute. The proposition is that, generally, it is impermissible "to use pension-eligibility as a basis for denying an older worker any *other benefit.*" Resp. 44 (emphasis added) (quoting S. Rep. No. 101-263, at 23; H.R. Rep. No. 101-664, at 40).

The point here was the same one that is addressed earlier—and that Kentucky wholeheartedly endorses: Just as an employer may not refuse to give health benefits, or severance benefits, or comparable pay to employees over a specified age, the employer may not achieve the same end by using "'other proxies for age for example pension or Medicare eligibility.'" Resp. 45 (quoting 136 Cong. Rec. 27,058 (1990)); *see supra* at 4-5. As is evident from the lengthy discussion in both the Senate and the House Reports, Congress was addressing a problem that had been sweeping the nation: Financially strapped private employers were firing employees, especially in plant closings, and selectively refusing to pay severance or health benefits to the older ones, by announcing that anyone with a pension was not entitled to either benefit. *See* H.R. Rep. No. 101-664, at 33; S. Rep. No. 101-263, at 23. They were blatantly using retirement eligibility as a pretext to discriminate against older workers.

The EEOC does not point to any portion of the legislative history addressing the issue presented here, where: (1) the disability retirement benefits were part and parcel of the retirement plan with numerous complementary features; (2) age is a factor in determining eligibility, but does not alone dictate any outcome; and (3) there is no reason to suspect that retirement eligibility is a pretext for age discrimination.

Policy ramifications. The EEOC never explains why, as a matter of sound policy, Congress would have wanted to invalidate retirement plans with these attributes. The only argument it offers is the concern—already rebutted above—that validating Kentucky's retirement statute here would be an invitation to rampant abuse. Resp. 26; *see supra* at 4-5. There is no cause for alarm because: (1) courts are perfectly capable of distinguishing rational linkages to age-based criteria from pretexts; (2) when an employer really does engage in such an artifice, there is a good chance extrinsic evidence will expose the motive; and (3) a plan motivated by such an intent will almost certainly yield a disparate impact of the sort that the EEOC could not even bring itself to allege in this case.

What the EEOC ignores, however, are all the reasons why Congress would never have wanted to invalidate plans like Kentucky's. Many states and local governments have retirement plans that have the same features as Kentucky's. *See* NASRA Br. at 8 & n.9 (citing examples). As several especially knowledgeable amici explain, invalidating Kentucky's plan could have "catastrophic ... results." *Id.* at 13-14. Such a ruling would

destabilize public pension plans by: "(1) upset[ting] the actuarial assumptions on which states make funding decisions; (2) lead[ing] to huge expenses in designing, managing and protecting these plans; (3) requir[ing] fundamental constitutional and statutory changes in virtually every state in the U.S.; and (4) foster[ing] uncertainty in the national financial markets." *Id.* at 8-9.

In many states where such a plan is struck, the liability will be crippling, because the state cannot rejigger the benefits retroactively. *See* States Br. at 11 & n.28; NASRA Br. at 11 n.12 (25 states have constitutional protections and many other protect the rights contractually).

The more profound impact, however, will be prospective. If Kentucky's approach is illegal, "then it would be virtually impossible to provide any meaningful *disability* retirement for young workers (with a minimum amount of actual service years) and at the same time provide a meaningful *normal* retirement to older workers (with a minimum amount of actual service years)." NASRA Br. at 9 n.9 (emphasis added). As Chief Judge Boggs noted, even after "extensive questioning ... at oral argument," the EEOC could not come up with any alternative "way to provide this sensible result under [the EEOC's] reasoning." J.A. 92. The end result will almost certainly be to "eliminate pension benefits for millions of workers who begin public service late in life." NASRA Br. at 14. This is hardly the outcome Congress was hoping to achieve in the name of combating age discrimination.

The EEOC assures this Court that finding a prima facie case of discrimination "does not mean that [Kentucky's] plan ... necessarily violates the ADEA." Resp. 23. The EEOC suggests the Court should find comfort in the fact that Kentucky has asserted "the cost-justification defense in 29 U.S.C. 623(f)(2)(B)(i)," and "may press that claim on remand." Resp. 24; *see* Resp. 15. The EEOC neglects to mention that it has taken the position that this defense is legally unavailable to Kentucky—and, therefore, to numerous similar state plans—because the disability program is not a separate disability insurance plan. *See* EEOC Ct. App. Br. at 22. If the EEOC is right about the scope of the defense, then a holding that the EEOC has established a prima facie case here will necessarily spell the demise of numerous public retirement plans across the country. But even if the EEOC turns out to be wrong (as Kentucky believes), the uncertainty will lead plans to avoid the risk of crushing liability and revise their plans to be less favorable to older workers, or to disabled ones, just as Kentucky did while this case was pending on appeal. *See* J.A. 40-41 n.2, 65 n.2 (amending statute prospectively to make disability benefits far less favorable to all employees).

IV. THE EEOC'S INTERPRETATION IS NOT ENTITLED TO DEFERENCE.

The EEOC urges this Court to defer to its construction of the ADEA on two grounds. Resp. 46-49. Both are meritless.

The EEOC's first argument relies on a passage in 29 C.F.R. § 1625.10 (1989), defining the cost-justification defense, which applies only *after* a prima facie case has been proven. As the EEOC

admits, the regulation does not purport "to address the antecedent question whether particular plan provisions *are* facially discriminatory"—which is the question at issue in this case. Resp. 46. That ends the inquiry, since this Court cannot defer to a position an agency has not addressed.

Nevertheless, the EEOC asks the Court to defer to what it deems a "clear implication" from a single sentence. Putting aside the absence of any precedent for the proposition that this Court should defer to agency "implications," there is no such implication to be drawn. The sentence refers to a circumstance where the defense is unnecessary:

> Where an employer under an employee benefit plan provides the same level of benefits to older workers as to younger workers, there is no violation of [the ADEA], and accordingly the practice does not have to be justified under [the defense].

29 C.F.R. § 1625.10(a)(2). From this, the EEOC somehow draws the illogical "implication" that the converse must be true—that "if an employee benefit plan does *not* 'provide[] the same level of benefits to older workers as to young workers,' the plan *will* [present a prima facie] violat[ion]" of the ADEA. Resp. 47. That is like interpreting the adage, "An apple a day keeps the doctor away," as a pronouncement that anyone who forgoes the daily allowance will be swarming with doctors.

Second, the EEOC argues that this Court should defer to a position the EEOC took in a compliance manual it published in October 2000. That manual does, indeed, support the EEOC's

position in this litigation. *See* 2 EEOC Compliance Manual No. 915.003, at 627:0009-10 (Oct. 3, 2000). That is unsurprising because the EEOC inserted the relevant passage into the compliance manual four years after the charge in this case was first filed with the EEOC and over a year after the EEOC brought this suit against Kentucky. Indeed, the manual recites the facts from its complaint in this case to illustrate a "facially discriminatory" retirement plan. *Compare id.* at 627:0009 *with* J.A. 9-15.

The EEOC's position on the compliance manual is doubly flawed. As an initial matter, this Court does not defer to manuals and guidelines that lack the force of law. *See Christensen v. Harris County*, 529 U.S. 576, 587 (2000); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 256-58 (1991). Moreover "[d]eference to what appears to be nothing more than an agency's convenient litigation position would be entirely inappropriate." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988); *see In re GWI PCS 1, Inc.*, 230 F.3d 788, 807 (5th Cir. 2000).

CONCLUSION

For these reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

E. Joshua Rosenkranz
Kenneth H. Kirschner
HELLER EHRMAN LLP
Times Square Tower
7 Times Square
New York, NY 10036
(212) 832-8300
josh.rosenkranz@hellerehrman.com
Counsel for Petitioners

Robert D. Klausner
Counsel of Record
KLAUSNER & KAUFMAN, P.A.
10059 N.W. 1st Court
Plantation, FL 33324
(954) 916-1202
bob@robertdklausner.com
Counsel for Petitioners

Gregory D. Stumbo
David Brent Irvin
OFFICE OF THE ATTORNEY GENERAL
700 Capitol Avenue
Suite 118, Capitol Building
Frankfort, KY 40601-3449
(502) 696-5300
attorney.general@ag.ky.gov
Counsel for Commw. of Kentucky

C. Joseph Beavin
James D. Allen
STOLL KEENON OGDEN PLLC
300 W. Vine Street, Suite 2100
Lexington, KY 40507-1801
(859) 231-3000
joseph.beavin@skofirm.com
Counsel for Petitioners

N. Scott Lilly
Second Assistant County Attorney
JEFFERSON COUNTY ATTORNEY'S OFFICE
531 Court Place
Suite 900, Fiscal Court Building
Louisville, KY 40202
(502) 574-6333
scott.lilly@louisvilleky.gov
Counsel for Jefferson County Sheriff's Department

William P. Hanes
Executive Director
J. Eric Wampler
General Counsel
KENTUCKY RETIREMENT SYSTEMS
Perimeter Park West
1260 Louisville Road
Frankfort, KY 40601
(502) 696-8644
eric.wampler@kyret.com
Counsel for Kentucky Retirement Systems

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